(2)

Supreme Court, U.S.
FILED
MAY 23 2005
OFFICE OF THE CLERK

No. 04-1264

In the
# Supreme Court of the United States

Buckeye Check Cashing, Inc., et al.,

*Petitioners,*

*v.*

John Cardegna, et al.,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Florida**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

F. Paul Bland, Jr.
*Counsel of Record*
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, DC 20036
Telephone (202) 797-8600

Christopher C. Casper
JAMES, HOYER, NEWCOMER & SMILJANICH, P.A.
4830 West Kennedy Blvd.
Suite 550
Tampa, Florida 33609
Telephone: (813) 286-4100

E. Clayton Yates
YATES & MANCINI, LLC.
311 Second Street, Suite 102
Fort Pierce, Florida 34950
Telephone (772) 465-7990

Richard A. Fisher
RICHARD FISHER LAW OFFICE
1510 Stuart Road, Suite 210
Cleveland, Tennessee 37312
Telephone (423) 479-7009

*Counsel for Respondents*

## Table of Contents


Page(s)

INTRODUCTION ..... 1

STATEMENT OF THE CASE AND OF THE FACTS ..... 4

REASONS FOR DENYING THE PETITION ..... 7

I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT. ..... 7

A. The Decision Below is Consistent With this Court's Guidance that Arbitration Clauses Are Subject to State Laws Applicable to All Contracts ..... 7

1. This Court Has Directed That Arbitration Clauses Are Governed By Generally Applicable State Law ..... 7

2. Florida Law Providing That Illegal Contracts Are Void *Ab Initio* Is Longstanding and Generally Applicable Law ..... 10

B. The Decision Below Is Consistent With the *Prima Paint* Decision ..... 13

1. *Prima Paint* Involves Contracts that Are Voidable, And Not Contracts that Are Void *Ab Initio* ..... 13

2. The Decision Below Is Consistent With this Court's Direction that Arbitration Clauses Be Placed On the Same Footing as Other Contracts ..... 15

C. Petitioners' Proposed Rule of Law Would Lead to Anomalous and Absurd Results ..... 18

D. Petitioners' Position Also Is Contrary to this Court's Direction in *Howsam* that Gateway Questions Relating to the Existence of an Arbitration Clause Are for the Court, Not the Arbitrator ..... 23

II. THIS CASE DOES NOT PRESENT AN ISSUE WORTHY OF CERTIORARI ..... 24

CONCLUSION ..... 25



**Table of Authorities**

**Cases**

*Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265 (1995) ..... 2, 7, 16

*Armendariz v. Foundation Health Psychcare Services, Inc.*, 99 Cal. Rptr. 2d 745 (2000) ..... 9

*Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004) ..... 9

*Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002) 21-22

*Buehler v. LTI Int'l, Inc.*, 762 So.2d 530 (Fla. 2d DCA 2000) ..... 11

*Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001) ..... 9

*Carll v. Terminix Int'l Co., L.P.*, 793 A.2d 921 (Pa. Super. Ct. 2002) ..... 9

*Chandris, S.A. v. Yanakaksis*, 668 So.2d 180 (Fla. 1995), *reh'g denied* (1996) ..... 12

*Chastain v. Robinson Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992) ..... 20-21

*Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) ..... 16

*D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004) .... 9

*Dumais v. American Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002) ..... 8

*Edwards v. Trulis*, 212 So.2d 893 (Fla. 1st DCA 1968) ..... 11

*Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002) ..... 16

*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ..... 7

*The Florida Bar-In re Amendment to the Code of Professional Responsibility Contingent Fees*, 349 So.2d 630 (Fla. 1977) ..... 12

*Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) ..... 17

*Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001) ..... *9*

*Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003) ..... 8

*Howsam v. Dean Witter*, 537 U.S. 79 (2002) ..... 23

*I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) ..... 21



*Iwen v. S. West Direct*, 977 P.2d 989 (Mont. 1999) ..... 9

*Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) ..... 23

*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) ..... 11

*Mazzoni Farms, Inc. v. E.I. DuPont DeNemours & Co.*, 761 So.2d 306 (Fla. 2000) ..... 14

*McMullen v. Hoffman*, 174 U.S. 639 (1899) ..... 11

*McMullen v. Meijer*, 355 F.3d 485 (6th Cir. 2004) ..... 9

*Murray v. United Food & Comm. Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002) ..... 9

*Popovich v. McDonald's Corp.*, 189 F. Supp.2d 772 (N.D. Ill. 2002) ..... 9

*Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) ..... *passim*

*Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405 (N.J. Super. Ct. App. Div. 2000) ..... 8-9

*Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3rd Cir. 2000) ..... 19

*Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) ..... 9

*Sperry v. Florida ex rel. Florida Bar*, 140 So.2d 587 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963) ..... 12

*Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) ..... 15, 20

*State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002) ..... 9

*Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), *cert. denied*, 125 S.Ct. 1304 (2005) ..... 9

*Thomas v. Ratiner*, 462 So.2d 1157 (Fla. 3rd DCA 1984) ..... 10

*Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991) ..... 21

*Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd's of London*, 963 S.W.2d 392 (Mo. Ct. App. 1998) ..... 9

*In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370 (Tex. Ct. App. 1999) ..... 9

*Umbel v. Foodtrader.Com, Inc.*, 820 So.2d 372 (Fla. 3rd DCA 2002) ..... 11

*Victoria v. Superior Court*, 222 Cal. Rptr. 1 (1985), *reh'g denied* (1986) ..... 8



*Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) ..... 7, 16, 17

*Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998) ..... 9

*Worldwide Inc. Group v. Klopp*, 603 A.2d 788 (Del. 1992) ..... 9

**Statutes and Legislative Materials**

Federal Arbitration Act, 9 U.S.C. 1, et seq. ..... *passim*

Florida's Lending Practices Act, Chapter 687, Florida Statutes ..... 5, 6

Florida's Consumer Finance Act, Chapter 516, Florida Statutes ..... 5, 6

Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes ..... 5, 6

Florida's Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes ..... 5, 6

**Other Authorities**

Blacks Law Dictionary (6th ed. 1991) ..... 10

Restatement 2d Contracts § 7 ..... 10

## INTRODUCTION

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that when two parties have agreed to arbitrate disputes arising out of a contract, and one party raises a defense against the enforceability of the entire contract (as opposed to the arbitration clause in particular), that the arbitrator – not the court – should resolve the challenge to the enforceability of the entire contract. Petitioners Buckeye Check Cashing, Inc. *et al* ("Petitioners" or "Buckeye") claim that the decision of the court below contradicts the holding of *Prima Paint*. Petitioners claim that the plaintiffs' argument in this case that the contract between the parties was illegal – indeed, that it was criminal – under Florida law, is a contract defense to a contract that has already been legally formed, and that since the defense relates to the entire contract (and not just the arbitration clause), that this defense should have been decided by an arbitrator, and not by the court.

Petitioner's argument is wrong for several reasons. First, Buckeye conveniently overlooks a central premise that underlay this Court's holding in *Prima Paint*: "the purpose of Congress [in enacting the Federal Arbitration Act ("FAA")] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." 388 U.S. at 404 n. 12. While Buckeye tends to suggest that this Court was establishing a new federal law of contract enforcement that should find that it is easier for parties to create an agreement to arbitrate than it is to form other types of contracts, this is not correct. In *Prima Paint*, there was no dispute that the parties had formed an agreement to arbitrate. There only question in *Prima Paint* was whether one party might be able to assert a defense against that agreement. As this Opposition will explain, the situation in this case is entirely different. Plaintiffs' arguments in this case go

to the creation of the contract in the first instance, and thus are very different from the contract defense at issue in *Prima Paint*.

Second, Petitioners ignore another subsequent line of decisions from this Court, that inform the way that *Prima Paint* must be understood. In these cases, this Court has repeatedly stated that agreements to arbitrate are subject to generally applicable principles of contract law. *See, e.g., Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Petitioners ignore generally applicable principles of state contract law, and rely upon the hope that this Court will create a new doctrine of contract law that applies only to agreements to arbitrate.

In the decision below, the Florida Supreme Court followed this Court's guidance in both *Prima Paint* and the subsequent cases. Under generally applicable principles of Florida law that date back more than 100 years and that have been repeatedly applied in cases that have nothing to do with arbitration, no contract is ever formed, and no contract ever comes into existence, from an agreement to perform a criminal act. App. at 7a-8a. Accordingly, as the Court below correctly recognized, App. at 5a-6a, *Prima Paint* does not speak to this situation. Petitioners repeatedly state that the doctrine barring the enforcement of illegal agreements is a contract defense, rather than a doctrine of contract formation. *E.g.*, Pet. at 11. In making this assertion, Petitioners simply misunderstand core principles of contract law. The doctrine that criminal contracts are void *ab initio* is thus fundamentally different from the law relating to *voidable* contracts. The latter body of law relates to a defense to a contract that has been formed, not whether a contract has ever come into existence in the first place.



In this case, plaintiffs allege a colorable claim that Petitioners are loan sharks that charge outrageous interest rates that violate Florida's criminal laws. Indeed, one of the consumer plaintiffs in this case was charged interest of over 1,300%. Accordingly, the court below faithfully applied this Court's guidance and held that where, as here, there is an issue under generally applicable principles of state contract law as to whether a contract was formed in the first instance, this gateway question must be resolved by a court.

As the Petition reflects, Petitioners do not like the normal principles of state law relating to contract formation. Instead, Petitioners would like this Court to declare that federal law overrides normal state laws relating to illegal contracts that are void *ab initio*. In demanding this result, Petitioners would have this Court re-write the principles applicable to the formation of all contracts, so that documents that would not form a contract in any other circumstance would form an enforceable contract if they contained an arbitration clause. Petitioners would have this Court delve into (and re-write) normal state law principles governing contract formation.

As the Court below noted, App. at 8a, Petitioners' position would lead to absurd results. Under Petitioners' logic, courts would be required to find that legally cognizable contracts existed (if they contained arbitration clauses) even if they provided for murder-for-hire, the sale of child pornography or the sale of illegal drugs. Under Petitioners' approach, documents establishing such relationships that contained agreements to arbitrate would have to be enforced to the extent of the arbitration clause, notwithstanding generally applicable state contract law to the contrary.

Petitioners' position also would lead to incoherence in contract law. Even Petitioners acknowledge that no arbitration contract comes into existence if there is no assent to that contract. Pet. at 11. To make this admission concrete, imagine a case where there is an allegation that Party A has forged Party B's name on a document that contains an arbitration clause. Petitioners would concede that a court, not an arbitrator, should and would decide whether the allegation of forgery was true. Nonetheless, Petitioners insist that questions of assent are the *only* type of contract formation question that a court, as opposed to an arbitrator may decide. According to Petitioners, all other questions that states might consider to be ones of contract formation under their generally applicable law of contracts – questions that go to whether a contract has come into existence in the first place – are reserved for the arbitrator. Pet. at 11-12. Petitioners' argument not only contradicts the FAA as interpreted by this Court, but leads to anomalous results. The FAA simply does not preempt some parts of normal state law relating to contract formation (those parts relating to assent), while nonetheless preempting other portions of state law relating to contract formation (those portions that are not consistent with Petitioners' interests, as loan sharks).

This case also does not merit this Court's intervention because the nature of the issue raised will affect very few disputes, in very few jurisdictions.

## STATEMENT OF THE CASE AND OF THE FACTS

This action was brought by respondents Cardegna and Reuter ("Plaintiffs") on behalf of a class of Florida consumers against Petitioners Buckeye Check Cashing, Inc. and Buckeye



Check Cashing of Florida Inc. and unknown entities and individuals (collectively "Petitioners"or "Buckeye"). The Plaintiffs allege an unlawful scheme in which Buckeye, under the guise of what it falsely portrayed as a check cashing service, in reality charged and collected unconscionably usurious interest from thousands of customers for consumer loans through systematically repeated violations of Florida's Lending Practices Act, Chapter 687, Florida Statutes; Florida's Consumer Finance Act, Chapter 516, Florida Statutes; Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes; and Florida's Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes.

Buckeye loaned money to its customers in exchange for a written document in the form of a personal check, and a form agreement to repay money in an amount larger than the borrower received within a short period of time, usually two to four weeks. These loans were then continued through loan extensions or roll-over transactions. In each transaction, the Plaintiffs gave Buckeye a personal check and agreed that the face value of the check would be paid within a short time period, usually two weeks. In exchange, Buckeye gave the Plaintiffs cash in an amount less than the face value of the check. In each transaction, Buckeye agreed to hold the check until the next payday or until the customer received her or his next social security or other government check.

Customers unable to repay these loans when due were permitted to extend their debt or roll-over their loans with Buckeye by paying "service fees" when they became due, usually every two weeks. In each transaction, once the Plaintiffs paid the "fee" to Buckeye, then Buckeye would again

forbear collection of the debt. The "fee" on each extension was interest for allowing Plaintiffs and members of the class to defer payment on the original extension of credit. The rate of interest charged by Buckeye on each initial transaction and on each rollover ranged from approximately 137% to 1,317% A.P.R., and the rate was usually over 300% A.P.R.

The plaintiffs here allege that the essence of the transaction is loaning money at highly usurious rates of interest and that the contracts were criminal on their face. In another case currently pending, the Florida Supreme Court is considering whether these transactions are loans. *McKenzie Check Advance of Fl. v. Betts*, No. SC04-1825. If that Court rejects the claims of McKenzie plaintiffs, that will render the instant case moot.

In any case, the plaintiffs here case allege that the policy of the State of Florida to protect its needy citizens from predatory lenders is set out in Chapter 687 of the Florida Statutes, which provides felony sanctions for such lending practices. The threshold for criminal usury is 25% per annum at which point violations constitute a first degree misdemeanor, § 687.071(2), Fla. Stat.(2001). Loaning money at an interest rate in excess of 45% per annum. is a third degree felony. § 687.071(3), Fla. Stat.(2001). Lending money at either the misdemeanor or felony levels of usury is defined as "loan sharking." § 687.071(1)(f), Fla. Stat.(2001). The instant agreements provide for interest rates as high as twenty-nine times the felony threshold!



## REASONS FOR DENYING THE PETITION

### I. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

#### A. The Decision Below is Consistent With this Court's Guidance that Arbitration Clauses Are Subject to State Laws Applicable to All Contracts.

##### 1. This Court Has Directed That Arbitration Clauses Are Governed By Generally Applicable State Law.

The FAA contains a savings clause that subjects arbitration clauses to the same state contract laws that apply to other types of contracts. This Court repeatedly has stressed that arbitration clauses are governed by state, not federal, contract law except in those instances where state contract laws target arbitration clauses for treatment that is inferior to other types of contracts. Indeed, this Court has noted that the rules of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA.[1]

---

[1] *See, e.g., Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"). *Cf., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law").

This Court has recently reiterated the importance of state contract law under the FAA's scheme. In *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), the bank argued that the FAA preempted South Carolina's state contract laws as they applied to the question of whether an arbitration could proceed as a class action. The decision rejected the federal preemption argument and stated that the question of contract interpretation is "a matter of state law. . . ." 123 S. Ct. at 2405.[2]

The Court below held that Florida's generally applicable law relating to illegal and void *ab initio* contracts applies to arbitration clauses. This is hardly an unusual position. There are numerous illustrations of courts applying generally applicable state contract law to arbitration clauses, even when the application of those laws will bar the enforcement of a given arbitration clause. For example, the generally applicable rule of contract law that ambiguities in contracts will be interpreted against the drafter will be applied to arbitration clauses, even where it results in not requiring a party to arbitrate her or his claims. *See, e.g., Victoria v. Superior Court*, 222 Cal. Rptr. 1 (1985), *reh'g denied* (1986); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002); *Quigley v. KPMG*

---

[2] This Court also held that the contract interpretation question was a matter for the arbitrator to decide. This is not surprising, given that there was an agreement by both parties that the arbitration contract was legal and binding. The Court stated that "The question here . . . [does not] concern . . . the validity of the arbitration clause. . . ." 123 S. Ct. at 2407. "Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, . . . [i]t concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question." *Id.* This case, by contrast, involves both the validity of the arbitration clause and a state statute.



*Peat Marwick, LLP*, 749 A.2d 405,416 (N.J. Super. Ct. App. Div. 2000). Similarly, the generally applicable rule of contract law that specific contract provisions will govern over general provisions applies to disputes over the construction of arbitration clauses, for example, even when it has the effect that a party will not be required to arbitrate her or his claims. *See, e.g., Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd's of London*, 963 S.W.2d 392, 399 (Mo. Ct. App. 1998). Finally, the generally applicable rule of contract law that unconscionable contracts will not be enforced applies to arbitration clauses, and while the vast majority of arbitration clauses are enforced by courts, courts have refused to enforce part or all of particularly abusive arbitration clauses that were grossly one sided and that explicitly or effectively stripped individuals of important rights.[3]

---

[3] *See, e.g., Murray v. United Food & Comm. Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002); *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004); *McMullen v. Meijer*, 355 F.3d 485 (6th Cir. 2004); *Popovich v. McDonald's Corp.*, 189 F. Supp.2d 772 (N.D. Ill. 2002); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 99 Cal. Rptr. 2d 745 (2000); *Worldwide Inc. Group v. Klopp*, 603 A.2d 788 (Del. 1992); *Iwen v. S. West Direct*, 977 P.2d 989 (Mont. 1999); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998); *Carll v. Terminix Int'l Co., L.P.*, 793 A.2d 921 (Pa. Super. Ct. 2002); *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), *cert. denied*, 125 S.Ct. 1304 (2005); *In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370 (Tex. Ct. App. 1999); *Sosa v. Paulos*, 924 P.2d 357, 262 (Utah 1996); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002).

### 2. Florida Law Providing That Illegal Contracts Are Void *Ab Initio* Is Longstanding and Generally Applicable Law.

As the Court below held, "Florida's law has long held that contracts which are determined to be against public policy and void should not be enforced." App. at 7a. This statement of law is entirely consistent with generally applicable principles of Florida contract law. Contracts which violate Florida criminal laws and public policy are illegal and void *ab initio* and cannot be enforced:

> The right to contract is subject to the general rule that the agreement must be legal and if either its *formation* or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal. *See* 11 Fla. Jur.2d, Contracts 81, Restatement of the Law, Contracts 512. . . . Where a statute imposes a penalty for an act, a contract founded upon said act is considered void in Florida.

*Thomas v. Ratiner*, 462 So.2d 1157, 1159 (Fla. 3rd DCA 1984), *reh'g denied* (1985) (emphasis in original).

Notwithstanding Petitioners' amplified rhetoric, Pet. at 16, this is hardly a new body of law that arises from a hostility to arbitration. Indeed, all standard texts acknowledge the general principle that an agreement that is void *ab initio* is one that "has at no time had any legal validity." Blacks Law Dictionary (6th ed. 1991). *See also* Restatement 2d Contracts § 7 ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promissory



is often called a void contract. Under § 1, however, such a promise is not a contract at all; it is the 'promise' or 'agreement' that is void of legal effect."). On a number of occasions, moreover, this Court has reached the same conclusions on this basic question of contract law. It is particularly incongruous for Buckeye to claim that federal law preempts Florida contract law providing that courts may enforce no part of void *ab initio* contracts, because Florida law is entirely consistent with this Court's own jurisprudence on the subject. This Court has held, for example, that no court will lead its assistance in any way towards carrying out the terms of an illegal contract. *McMullen v. Hoffman*, 174 U.S. 639 (1899). This Court has also held that illegal promises will not be enforced in cases controlled by federal law. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S. Ct. 851, 70 L.Ed.2d 833 (1982). There is no indication that the FAA was intended to disrupt this fundamental principle.

Under general principles of Florida contract law (like the law elsewhere), the rule against the enforcement of void contracts is not a partial one that selectively invalidates parts of contracts. Instead, it is an absolute rule that invalidates void contracts in their entirety. "[I]t must be held that as a matter of law any contract made in violation of [the Act's] terms, provisions or requirements is void and confers **no enforceable rights** on the contracting parties." *Umbel v. Foodtrader.Com, Inc.*, 820 So.2d 372, 374 (Fla. 3rd DCA 2002) (emphasis added) (citing *Edwards v. Trulis*, 212 So.2d 893, 895 (Fla. 1st DCA 1968) and *Buehler v. LTI Int'l, Inc.*, 762 So.2d 530 (Fla. 2d DCA 2000)).

In cases arising in entirely different contexts, the Florida Supreme Court has explained in some detail the corrosive effect upon the entire legal system of treating an illegal contract as merely voidable, rather than void:

> If we were to hold a Florida contingent fee contract entered into by a person or attorney who is not a member of The Florida Bar to be voidable rather than void, we would be recognizing the validity of a contract entered into by an attorney not subject to our regulations. This would afford viability to an unregulated contract of the very kind that we have determined to be in the public interest to regulate. *The Florida Bar-In re Amendment to the Code of Professional Responsibility Contingent Fees*, 349 So.2d 630, 632 (Fla. 1977). Additionally, recognizing such an agreement would be directly contrary to the reasons we have expressed for prohibiting the unauthorized practice of law. *Sperry v. Florida ex rel. Florida Bar*, 140 So.2d 587, 595 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963).

*Chandris, S.A. v. Yanakaksis*, 668 So.2d 180, 185 (Fla. 1995), *reh'g denied* (1996).

Under generally applicable Florida contract law, therefore, an agreement which itself violates Florida's public policy and criminal law and is illegal is void *ab initio*; no valid agreement ever comes into existence in the first place.



### B. The Decision Below Is Consistent With the *Prima Paint* Decision.

#### 1. *Prima Paint* Involves Contracts that Are Voidable, And Not Contracts that Are Void *Ab Initio*.

Buckeye does not present any authority denying that generally applicable Florida contract law renders criminal contracts void ab initio. Instead, Buckeye effectively argues that an exception to this rule exists for arbitration clauses, suggesting that arbitration clauses are subject to a special and separate set of rules from other types of contract terms. Buckeye derives this proposition from the FAA and this Court's decision in *Prima Paint*, 388 U.S. 395. According to Buckeye, under *Prima Paint* no Court may consider whether Buckeye's contract is illegal and void *ab initio*, because that is a decision for the arbitrator. Pet. at 2. Buckeye's position is flatly wrong.

Buckeye's reading of *Prima Paint* ignores the crucial distinction between a void and voidable contract. Buckeye keeps insisting, without providing any basic contract law authority for the proposition, that the doctrine refusing to recognize illegal contracts is not a doctrine relating to contract formation. Pet. at 11-12. Buckeye further insists that the distinction between voidable contracts and void ab initio contracts is one without a difference. Pet. at 1. These arguments can only be advanced if one disregards core principles of contract law.

A voidable contract, unlike a void *ab initio* contract, is "one where one or more parties have the power, by a

manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." Restatement 2d Contracts § 7. With a voidable contract, a valid contract has come into legal existence, although it is possible that one party might successfully defend against its enforcement. For example, under Florida law, "[i]t is axiomatic that fraudulent inducement renders a contract voidable, not void." *Mazzoni Farms, Inc. v. E.I. DuPont DeNemours & Co.*, 761 So.2d 306, 312 (Fla. 2000).

As set forth above, under Florida contract law (like the law in most if not all other states), a contract that is fraudulently induced is merely voidable; a valid contract exists, but is potentially subject to a defense from one party. In such a setting, enforcing the arbitration clause so that the arbitrator may decide this defense is entirely consistent with generally applicable contract law. Contracts that are void *ab initio* pose an entirely different situation. A void *ab initio* contract never comes into existence, and no part of such a contract may ever be enforced by a court, and thus no arbitration clause ever comes into existence. There is nothing to arbitrate. Petitioner misreads the *Prima Paint* rule to sanction the extreme result of requiring a court to enforce an arbitration clause that is embedded in and part of a contract with a singularly illegal purpose and which is, in and of itself, illegal and void.

Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has stressed the importance of this factor: "Fraud in the inducement does not negate the fact that the parties actually reached an agreement. *That's what was critical in Prima Paint*. But whether there was *any* agreement is a



distinct question." *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (first emphasis added, second in original). Because Buckeye ignores this fact, properly described by Judge Easterbrook as "critical," Buckeye's proposed extension of *Prima Paint* misunderstands that case, misunderstands federal arbitration law, and is simply wrong.

### 2. The Decision Below Is Consistent With this Court's Direction that Arbitration Clauses Be Placed On the Same Footing as Other Contracts.

Petitioner effectively insists that *Prima Paint* requires courts to treat arbitration clauses are different than any other terms to any contract. As set forth above, Florida's generally applicable rules of state contract law provide that illegal contracts are void *ab initio*, meaning that they never come into existence in the first place. Buckeye argues that among all types of contracts, arbitration clauses alone are exempt from this longstanding body of Florida law, because the FAA supposedly preempts Florida's contract law.

This Court has repeatedly rejected such an approach, however. In interpreting the FAA, this Court has repeatedly given meaning to the language of the Savings Clause and instructed that federal policy regarding arbitration is simply one of enforcing contracts and that the FAA does no more or less than place arbitration agreements on the same footing as other agreements. For all of its discussion of *Prima Paint*, Buckeye never addresses the crucial part of that opinion which undermines all of Buckeye's arguments here. See page 1, *supra*, citing 388 U.S. at 404 n. 12.

In *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), similarly, the Court refused to enforce an arbitration provision in an employment contract in a case where claims were asserted by a federal agency that was not a party to that contract. In the *Waffle House* case, the lower court had effectively treated arbitration clauses as some sort of super contract especially favored under federal law. This Court rejected the notion that the FAA embodied a policy goal that would form arbitration agreements in circumstances where no other type of contract could be formed. 122 S. Ct. at 764. Instead, this Court directed, the FAA requires courts to place arbitration agreements on equal footing with other contracts, but it does not require parties to arbitrate when they have not agreed to do so.' *Id.* at 764 (*quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

This Court also stressed that arbitration clauses are to be treated the same as other contracts in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Casarotto*, the Court held that the FAA preempted a state statute that imposed specific disclosure requirements applicable only to arbitration agreements. The Court echoed its earlier decisions in explaining that, through the FAA, Congress precluded states from singling out arbitration provisions for suspect treatment, requiring instead that such provisions be placed upon the same footing as other contracts. *Id.* at 687 (internal quotation omitted). *See also Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995):

> States may regulate contracts, including arbitration clauses, under general contract law



> principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract. 9 U.S.C. 2 (emphasis added). What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent.

Petitioner's arguments rely upon the implicit and faulty notion that the FAA preempts generally applicable state contract laws, as they apply to arbitration. Indeed, Petitioners re-write *Prima Paint* into a federal preemption case. This suggestion conflicts with the remainder of this Court's preemption jurisprudence. As this Court has recognized, however, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Therefore, the FAA can only displace state law through the doctrine of implied conflict preemption. *Id.* at 477-78. In order to establish that the FAA impliedly preempts Florida's contract law relating to void *ab initio* contracts, Buckeye must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[] as an obstacle to the accomplishment and execution of full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). Implied conflict

preemption cannot lie here because the FAA contains no independent rules of federal law for governing these questions of contract law.

### C. Petitioners' Proposed Rule of Law Would Lead to Anomalous and Absurd Results.

Generally applicable principles of Florida contract law – like the law in other states – define and give meaning to the phrase void *ab initio*. As set forth above, any contract that is void *ab initio* is not even a contract, and never comes into existence in the first place. This section will discuss a number of cases that support the logic of the decision below, and that even Petitioners acknowledge are correctly decided. In their unprincipled effort to distinguish these cases, Petitioner argues that the FAA requires that states contort their law of contracts in an illogical way. According to Petitioners, the FAA provides that certain types of void *ab initio* contracts (such as those with an unauthorized signature) may be treated as all void *ab initio* contracts have been treated for more than 100 years, but that for no principled reason, parts of other types of void *ab initio* contracts (such as illegal contracts) must be recognized by courts and forced (at least to the extent of any arbitration clause).

As the Court below noted, App. at 6a, and as even Petitioner has acknowledged, Pet. at 11, a host of courts have refused to extend *Prima Paint*'s holding to cases involving allegations that no contract ever came into existence in the first place. These courts have held that this latter type of allegation by definition implicates the making of the agreement for arbitration and therefore must be decided by a court as a



precondition to any arbitration order under the FAA. A particularly important precedent is *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3rd Cir. 2000) (Becker, J.). While *Sandvik* did not involve an illegal contract, the court's analysis of the importance of the distinction between void and voidable contracts closely tracks the logic employed by the Florida Supreme Court in this case. In *Sandvik*, the Third Circuit held that a party cannot enforce an arbitration clause while denying that it is bound by the contract containing that clause because, "[e]ven under the severability doctrine [of *Prima Paint*], there may be no arbitration if the agreement to arbitrate is non-existent." *Id.* at 101. The Third Circuit construed *Prima Paint* as applying only to allegations that would render a contract *voidable*, and held that courts must resolve all allegations that would render an entire contract (and therefore its arbitration clause) *void*:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be void or non-existent, as is contended here, and those that are merely voidable, as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of the arbitration agreement is in dispute.

*Id.* at 107.

Several other courts have followed the same analysis as *Sandvik* in holding that courts, not arbitrators, must evaluate challenges that an entire contract never came into valid

existence in the first place. In *Sphere Drake*, for example, the Seventh Circuit faced the question of whether an arbitrator or a court should resolve allegations that the person who signed a contract on behalf of one party had the authority to make that commitment. The party attempting to enforce the arbitration clause invoked *Prima Paint*, and claimed that this was a generalized challenge to the entire contract that the arbitrator should resolve. Focusing on the difference between void and voidable contracts, the Seventh Circuit rejected this claim, and held that the question was one for the court:

> This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being; and as arbitration depends on a valid contract an argument that the contract does not exist can't magically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).

*Sphere Drake*, 256 F.3d at 591.

In *Chastain v. Robinson Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992), similarly, the court held that a court, not an arbitrator must decide allegations that a signature to a contract was forged. The Eleventh Circuit focused on the difference between arguments that are contract defenses and arguments that go to the existence of a contract:

> The calculus changes when it is undisputable that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of *any*



> agreement, *including the existence of an agreement to arbitrate*. Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act.

*Chastain*, 957 F.2d at 854. *See also Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (court decides whether signatory to contract had authority to bind party, we read *Prima Paint* as limited to challenges seeking to *avoid* or *rescind* a contract not to challenges going to the very existence of a contract) (emphasis in original); *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (court decides whether assignee can enforce contract).

The cases relied upon by Buckeye, by contrast, fragment state contract law in indefensible ways. This is illustrated by one of Buckeye's leading cases. In *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), the Court acknowledged that arbitration clauses are not to be enforced when they are embedded in contracts that are void *ab initio* because one party did not have the authority to sign the contract. The Court then implicitly created a new rule of federal law (in an area plainly to be governed by state law), that illegal contracts are subject to a different rule because the issue of illegality only goes to "the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original). The *Bess* opinion never explains the rationale or cites any authority for this conclusory statement. Florida's generally applicable contract law is to the contrary. Buckeye never challenges this conclusion as to Florida law. Given that *Bess*'s characterization of illegality as unrelated to

the existence of a contract is simply wrong as a matter of contract law, *Bess*'s holding relies upon the mistaken conclusion that federal law preempts and overrides a state's generally applicable and longstanding rules of contract law.

Buckeye gives no convincing explanation for why the Congress, when it passed the FAA in 1925, could have possibly intended to honor generally applicable state law as to contracts that are void *ab initio* in some settings but to sweep it aside in others.

Petitioners' insistence that arbitration clauses are somehow above or exempt from this well-established body of law could readily lead to absurd results. Imagine hypothetical contracts for the sale of cocaine, or the making of child pornography, or a murder-for-hire, that included (a) a liquidated damage provision; and (b) an arbitration agreement. Obviously such contracts would violate any number of criminal laws and be void *ab initio*. No legal agreement has ever come into being and no court or arbitrator could order or otherwise authorize performance - any performance - under the contract. Similarly, it is obvious that no court would, could or should ever enforce the liquidated damages provision. Under the position advocated by Buckeye, however, the arbitration clause is somehow different from and better than all other provisions in this wholly illegal contract, and the arbitration clause would be enforced. Indeed, under Petitioner's position, any question concerning the illegality of the entire contract would be one that only the arbitrator could adjudicate. These hypotheticals demonstrate the extreme and unjustified nature of Buckeye's position.



### D. Petitioners' Position Also Is Contrary to this Court's Direction in *Howsam* that Gateway Questions Relating to the Existence of an Arbitration Clause Are for the Court, Not the Arbitrator.

Petitioners' position also conflicts with this Court's decision in *Howsam v. Dean Witter*, 537 U.S. 79, 123 S. Ct. 588 (2002). In *Howsam*, this Court unsurprisingly held that an arbitrator, not a court, should determine whether a party violated an arbitration rule. After all, as the Court noted, "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." *Howsam*, 123 S. Ct. at 593. There was no question that the parties were bound by a legally valid arbitration agreement, however, and this Court explained that disputes on *that* question are for the court. "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." 123 S. Ct. at 592. This case involves precisely the type of "gateway question" that this Court has said is for the court, not the arbitrator.

Petitioner asserts repeatedly that there are six federal courts of appeal that support its position and conflict with the decision below. *E.g.*, Pet. at 2. It is notable, however, that only one of those decisions came after this Court handed down *Howsam*. The only exception is *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005), and that case offers no convincing explanation of how its ruling could be consistent with *Howsam*.

## II. THIS CASE DOES NOT PRESENT AN ISSUE WORTHY OF CERTIORARI.

Buckeye employs a great deal of high octane rhetoric about how the entire structure of the FAA will come undone if courts rather than arbitrators decide the question of whether a contract is illegal. *See* Pet. at 15. This argument ignores the unique nature of the allegations in this case. The rather unusual allegations in this case argue that Buckeye's contracts violated Florida's *criminal* laws, and that Buckeye was engaged in felonious loansharking.

This sort of issue rarely arises in civil cases. Civil plaintiffs regularly argue that some particular conduct of a defendant breaks a contract or gives rise to a remedy under some remedial statute, but it is quite rare to encounter a civil plaintiff arguing that an entire line of business operated contrary to the rule of law and is per se illegal. It is particularly rare to see a case, such as this, where there are substantive arguments that the entire enterprise is *criminal*. A ruling for the plaintiffs here will have no effect upon traditional banks, or any other legitimate business enterprise. A ruling for the plaintiffs here will only impact upon businesses whose contracts are wholly illegal, such as the loanshark defendants here, or the cocaine sellers or child pornographers hypothesized above. The ruling of the court below is highly unlikely, as a practical matter, to be applicable in many cases. It is hard to perceive how the decision could apply to the activities of credit card issuers, for example: their operations are not generally even arguably criminal(as normal lenders never charge interest rates of 300% to 1,300%). In short, the ruling below is likely to largely only relate to the payday lending industry.



In short, the issue posed by this case is unlikely to recur often. Petitioners ask this Court to find that an arbitration clause embedded in a criminally illegal contract is not subject to generally applicable state contract law providing that illegal contracts are void *ab initio* and thus never come into existence in the first place. The self-evident fact is that Buckeye's rhetoric about the grave nature of the assault on the architecture of the FAA is greatly exaggerated.

## CONCLUSION

For all the reasons set forth above, this Court should deny the Petition for certiorari.

Respectfully submitted,

F. Paul Bland, Jr.
*Counsel of Record*
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW
Suite 800
Washington, DC 20036
Telephone (202) 797-8600

E. Clayton Yates
Yates & Mancini, LLC.
311 Second Street, Suite 102
Fort Pierce, Florida 34950
Telephone (772) 465-7990

Christopher C. Casper
James, Hoyer, Newcomer &
Smiljanich, P.A.
4830 West Kennedy Boulevard
Suite 550
Tampa, Florida 33609
Telephone: (813) 286-4100

Richard A. Fisher
Richard Fisher Law Office
1510 Stuart Road, Suite 210
Cleveland, Tennessee 37312
Telephone (423) 479-7009

*Counsel for Respondents*

Date: May 23, 2005